JD–14–10
Waukee, IA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMERICAN FIRESTOP SOLUTIONS, INC.

and Case 18–CA–19133

THE INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ALLIED WORKERS LOCAL NO. 74

Nichole Burgess-Peel, Esq., for the General Counsel.
Matthew Brick and Douglas Fulton, Esqs. (Brick Gentry P.C.),
of West Des Moines, Iowa, for the Respondent.
Michael E. Amash, Esq. (Blake & Uhlig, P.A.),
of Kansas City, Kansas, for the Charging Party

DECISION

Statement of the Case

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Des Moines, Iowa on November 4, 2009. The charge was filed July 31, 2009,[1] and the complaint was issued October 6, 2009. The complaint alleges that American Firestop Solutions, Inc. (the Company) has "refused to meet and bargain" with the Union, "withdrew its recognition of the Union as the exclusive collective-bargaining representative of the Union" and has altered Union "employees' wages and benefits" since the withdrawal. The Company denies the material allegations in the complaint.

On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by the General Counsel, the Company and Charging Party, I make the following

Findings of Fact

I. Jurisdiction

The Company, a limited liability company, is engaged in the containment business installing fire stopping materials and services for commercial buildings at its facility in Waukee, Iowa, where it annually derives gross revenue in excess of $500,000 and purchases and receives goods and services valued in excess of $50,000 from suppliers outside the State of

[1] All dates are from December 31, 2008 to December 31, 2009 unless otherwise indicated.

[2] I have considered the demeanor of the witnesses, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some, but not all, of what a witness said. See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d. Cir. 1950), reversed on other grounds 340 U.S. 474 (1951).

Iowa. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Respondent's Operations

The Company has been involved in the business of installing firestopping products and services since 2001. The firestopping process includes the application of sealants, mineral insulation and rock wool to locations where mechanical and electrical systems pass through drywall or concrete walls in order to prevent fire from penetrating through those areas. Firestopping, however, is distinguishable from the process of insulating a structure in order to enable it to retain its desired temperature.[3]

The Company is owned by brothers Mark and Dave Gilchrist. Mark Gilchrist (Gilchrist) serves as president; Dave Gilchrist serves as vice president. As of August 1, 2009, the Company had approximately 17 employees; 12 of those employees comprise the field staff. At the pertinent time in 2003, the Company also employed 12 field staff.[4]

B. The 2003 and 2006 Joint Trade Agreements

At some point after the Company commenced operations, its employees were approached on a jobsite by union members. The Gilchrists were informed of that interaction and responded by pondering the business advantages of affiliating with the Union. They realized that they were competing in a "union town" and might need to affiliate with the Union if they were going to compete for larger contracts.[5]

In 2003, Gilchrist contacted Charles Shull, the Union's business representative, about the possibility of affiliating with the Union. Shull agreed that the Union would serve as the Company's hiring hall, train the Company's employees and "go out and fight for [the Company's] work."[6] After negotiations with Shull, Gilchrist invited him to the Company's warehouse to make a presentation to the employees. Shull accepted Gilchrist's offer and "laid it all out" to the

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[3] Mark Gilchrist, the Company's president, testified that firestopping is different from insulation, but did not explain the distinction. (Tr. 49–50.) He did, however, explain the firestopping process, while insulation work is a generally known trade in the construction industry. Although firestopping is presumably distinct from insulation, it is likely considered construction work for the purposes of Sec. 8(f) because it "involves the alteration and repair of buildings and permanently attached fixtures and equipment." *U.S. Abatement, Inc.*, 303 NLRB 451 (1991) (finding that the removal of asbestos was considered construction work because the company removed one type of insulation to be substituted by another, and reinsulation is a construction industry activity).

[4] Gilchrest's testimony indicates that the number may have fluctuated over the years. (Tr. 50.)

[5] In the absence of more specific testimony as to who visited the jobsite, I construe Gilchrist's hearsay testimony to refer to construction workers who were union members, not union officials. However, I do not credit his uncorroborated double hearsay testimony about alleged threats and complaints made by union members to his employees. (Tr. 51–52.)

[6] Gilchrist's testimony regarding his conversations with Shull were unrefuted, since Shull died sometime in 2007. (Tr. 17, 52.)

employees. He told them about the Union, the benefits of joining and the process involved, including the "card check" process. He concluded the presentation by explaining that it was up to the employees to decide if they wanted to join the Union. At some point after that meeting, the Union obtained and provided the Company with union authorization cards signed by a majority of the Company's full-time and regular part-time insulators. The Company acknowledged and agreed that a majority of the insulators did, in fact, select the Union as their collective-bargaining representative.[7] As a result, on October 23, 2003, the Company and the Union entered into an agreement, titled the Industrial/Commercial Insulator Working Agreement ("2003 Agreement"), with the Midwest Insulation Contractors Association ("MICA").[8] The 2003 Agreement, whose term ran from August 1, 2003 through July 31, 2006, stated in pertinent part at Article 1, Section 1:

> Pursuant to Local No. 74's claim that it represents an uncoerced majority of the Employer's full-time and regular part-time insulators, the Employer has submitted to a "card check" and hereby acknowledges and agrees that a majority of the subject employees have, in fact, authorized Local No. 74 to represent them in collective bargaining. Therefore, the Employer agrees to recognize and does hereby extend recognition Local No. 74, its agents, representatives or successors, as the exclusive bargaining agent for all employees in the bargaining unit described below, as if Local No. 74 had been certified as exclusive bargaining representative pursuant to Section 9(a) of the National Labor Relations Act.

The bargaining unit was essentially defined at Articles I and III as follows:

> All full time and regular part-time mechanics, apprentices, pre-apprentices and applicators who perform insulation and/or fire-stop work and are employed at the

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[7] This critical finding is based on that portion of Gilchrist's testimony that is consistent with the Company's representations in the 2003 Agreement, specifically, its agreement that the Union made a "claim" that it represented a majority of the insulators, that the Company "submitted to a card check" and acknowledged that a majority of its employees selected the Union as their collective-bargaining representative. (GC Exh. 3; R. Exh. D.) As such, I do not credit his testimony that none of his employees were union members at the time the parties executed the 2003 Agreement on October 23, 2003. (Tr. 58.) His testimony that a majority of the employees joined "over time," without further corroboration as to time, is simply unreliable for several reasons. First, he provided no credible explanation as to why the Company agreed to the specific representations in the 2003 Agreement—the "claim" by the Union, submitting to a "card check" and acknowledgement of "majority" representation—if they were not true. Second, he provided no testimony as to the timeframe in which Shull made his presentation and when a majority of the employees agreed to join the Union. Lastly, he failed to explain the reason for the retroactivity of the 2003 Agreement to August 1, 2003, which was nearly 3 months before the 2003 Agreement was executed. The existence of such a period of time is more consistent with a factual scenario in which Shull made his presentation during that nearly 3 month period, proceeded to collect authorization cards and presented them to the Company prior to October 23, 2003.

[8] The Company and General Counsel stipulate that the Company and the Union "executed certain agreements between 2003 and 2007, and those documents speak for themselves." (Jt. Exh. 2.)

> Company's Waukee, Iowa location; excluding professional employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act.[9]

The 2003 Agreement also included a provision at Article 19 permitting its termination and modification:

> It is further agreed that either party may terminate or propose amendments to this Agreement by notifying the other party in writing no more than ninety (90) days nor less than sixty (60) days prior to the termination date of this Agreement of its desire to change or terminate this Agreement.

In August 2006, MICA and the Union, joined by the Company, entered into another Joint Trade Agreement ("2006 Agreement"),[10] which stated in pertinent part at Article 1, Section 1:[11]

> The Employer Agrees to recognize the Union, its agents, representatives or successors, as the exclusive bargaining agent for all employees in the bargaining unit described below, as if the Union had been certified as exclusive bargaining representative pursuant to Section 9(a) of the National Labor Relations Act.

The 2006 Agreement was effective for 1 year and provided that, prior to its expiration, the parties would meet to discuss market conditions, "and any adjustment that may be needed to the contract or the renewal for 2 (two) additional years." The same section also contained termination language identical to that in the 2003 Agreement.

C. The 2007 Firestopping Addendum

In or around 2007, Gilchrist sought and received the assistance of the International Association of Heat & Frost Insulators and Allied Workers (the International) in attempting to promote his Company's services beyond Iowa and onto the national market. At the direction of the International, local union affiliates were directed to negotiate reduced wage rate changes to their collective-bargaining obligations with the Company and other firestopping "union contractors" around the country. The contractors convinced the International that the changes were needed in order to distinguish firestopping from traditional insulation work and make them more competitive. Consequently, the firestopping contractors developed and proposed a uniform addendum to each of their collective-bargaining agreements, which essentially lowered the wage rates of employees engaged in firestopping work.[12]

On October 26, 2007, Ted Watson, Shull's successor as business representative, and Gilchrist executed such a contract addendum (2007 Addendum).[13] The 2007 Addendum's term

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[9] My finding is a synopsis of the more extensive description of the bargaining unit, which contained a definition of each of the 4 categories in Article I, Section 4, and referenced the scope of their work at Article III, Sections 1 and 5, of the 2003 Agreement.

[10] Jt. Exh. 2.

[11] GC Exh. 4.

[12] Watson did not refute Gilchrist's version of the circumstances leading up to the execution of the 2007 Addendum. (Tr. 20–21, 60–65.)

[13] My impression of the conflicting versions of the 2007 Addendum offered by the parties indicates that they executed the version, which was incorrectly dated August 1, 2008—the same date as its expiration date. (GC Exh. 5.) However, the Company corrected its version by

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extended from October 1, 2007 to August 1, 2008, but would expire earlier upon termination of the "successor Agreement" or upon 30 days written notice by either party "if Firestopping has not been made a Davis-Bacon wage classification and does not appear likely to become a Davis-Bacon wage classification on or before July 30, 2008."[14] In addition to setting forth the applicable wage rates for firestopping work, the 2007 Addendum also contained provisions relating to union recognition, union security, hiring procedures, management rights, dues check off, welfare and pension plans, and grievance procedures. The recognition clause of the Addendum contained in Article 1 stated:

> The Employer recognizes the Union as the sole and exclusive bargaining representative for all its employees (excluding professional employees, office clericals and supervisors as defined in the National Labor Relations Act), in the employment of the Employer with respect to wages, hours, and other terms and conditions of employment on any and all work described in Article II of this Addendum and carried out on all projects performed by the Employer.[15]

D. The Company Withdraws Recognition of the Union

Since about October 2003 until August 1, 2009, the Company abided by the terms of the 2003 and 2006 Agreements and the Addendum by contributing to various fringe benefit funds, including the Union's pension fund and the Indiana State Council of Roofers Health and Welfare Fund.[16] On May 29, 2009, Gilchrest wrote to the Union informing it of the Company's intent to terminate their collective-bargaining relationship. The letter stated, in pertinent part:

> As you know, [the Company] has, in the past, had a contractual relationship with the [Union] by virtue of its membership in [MICA]. The first contract was dated August 1, 2006 (hereinafter "Original Agreement") between MICA and the Union. An Addendum to that contract was entered into between [the Company] and the Union on October 1, 2007 (hereinafter "Addendum").
>
> Although the Original Agreement and the Addendum have, by their terms, expired and are of no force and effect, [the Company] did want to give the Union ample notice of its intent to sever any relationship with the Union. As a result, [the Company] is notifying the Union that it will no longer recognize it as the exclusive bargaining agent for all employees in the bargaining unit described in either of those agreements. This recognition will be withdrawn effective August 1, 2009. We assume you will notify your members of this change accordingly.[17]

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inserting the date of October 1, 2007. (R. Exh. C; Tr. 22.) Regardless of the discrepancy, Art. XI in both documents indicated a term of October 2007 through August 1, 2008.

[14] A Davis-Bacon Act wage trade classification is one for which the Wage and Hour Division of the U.S. Department of Labor has determined the prevailing wage rate to be paid on federally funded or assisted construction projects. *See* 29 CFR §1.5 and 1.6(b*)*.

[15] GC Exh. 5; R. Exh. C.

[16] Jt. Exh. 2.

[17] Here, again, was another instance in which I did not find Gilchrist credible. He testified that his sudden about-face decision declining to negotiate with the Union in 2009 arose after "reviewing the contracts" and "[contacting] counsel for advice." This action strongly suggests a belief on Gilchrist's part that the Company was enmeshed in a collective-bargaining relationship and, 6 years after it began, was looking for a way out of it. (GC Exh. 6.)

Sometime after receipt of the Company's withdrawal letter, Gilchrist received an email from Watson, the Union's current business representative, requesting a meeting to resolve the issues. Gilchrist never responded to Watson's email.[18] Consequently, the Union sent a letter to the Company on July 27, 2009 stating:

> [T]he contract entered into between American Firestop and the Union is governed by Section 9(a) [of the Act]. Under the contract, the Union is certified as the exclusive bargaining representative for all employees in the bargaining unit, as described in the contract. As a result of the relationship between the Union and American Firestop, American Firestop is legally obligated to meet and confer with the Union for the purposes of negotiating and modifying the contract entered into between the parties.[19]

The Company responded to the Union's letter by affirming its position that the parties were governed by Section 8(f) of the Act and mentioning again that any agreements would terminate on August 1, 2009.[20] The Company subsequently withdrew recognition of the Union on August 1, and as of that date it has stopped making payments to the Union's fringe benefit funds and made other changes to the unit employees' terms and conditions of employment.[21] The Company withdrawal of recognition from the Union was premised on its position that the relationship between the parties is not governed by Section 9(a) of the Act and thus its withdrawal of recognition is not unlawful.[22] At the time of withdrawal, 10 of the Company's 12 field employees were bargaining unit members.[23]

Legal Analysis

The complaint alleges that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union for the terms of a successor contract, withdrawing recognition of the Union on August 1, 2009, and unilaterally changing the terms and conditions of employment of bargaining unit employees.[24] The Company denies any continuing obligation to meet and bargain with the Union at any time after August 1, 2009 on the ground that the Union has failed to establish the existence of a 9(a) collective-bargaining relationship. In any event, the parties agree that the determining issue is whether their relationship was governed by Section 8(f) or 9(a) of the Act.[25]

Section 8(a)(5) of the Act provides that it "shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." In that regard, "it is well established that Section 8(a)(5) and (1) prohibit an employer that is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by that agreement without

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[18] Gilchrest did not deny receiving Watson's email. (GC Exh. 10; Tr. 25–26.)

[19] GC Exh. 7.

[20] GC Exh. 8.

[21] Gilchrist conceded that he made the changes upon withdrawing recognition on August 1, 2009. (Tr. 70.)

[22] Jt. Exh. 2.

[23] I base this finding on Gilchrist's credible testimony. (Tr. 50.) Watson, on the other hand, could only estimate that all of the Company's 10 or 11 employees were bargaining unit members. (Tr. 15–16, 27–28.)

[24] GC Exh. 1.

[25] Jt. Exh. 2.

obtaining the consent of the union." *Kane Systems Corp.*, 315 NLRB 355 (1994). Generally, the employer's obligation to adhere to the terms and conditions of employment contained in an expired contract continues until a new agreement is concluded or good-faith bargaining leads to impasse. *R.E.C. Corp.*, 296 NLRB 1293 (1989).

I. The Relationship Between the Parties

The seminal issue is whether the Company and the Union entered into a relationship governed by Section 9(a) or 8(f) of the Act. Section 9(a) provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." Section 8(f), on the other hand, provides an exception to Section 9(a) for employers engaged primarily in the building and construction industries by permitting them "to enter into a bargaining agreement even though the majority status of such labor organization has not been established under the provisions of section 9 of this Act . . . prior to the making of such agreement."[26] The distinction between a union's representative status under Sections 9(a) and 8(f) is significant because an 8(f) relationship may be terminated by either party upon expiration of their agreement. *Allied Mechanical Services,* 351 NLRB 79, 81 (2007); *John Deklewa & Sons*, 282 NLRB 1375, 1386–1387 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. 1988). By contrast, a 9(a) relationship and the associated obligation to bargain continue after contract expiration, unless and until the union is shown to have lost majority support. *Levitz Furniture Co.*, 333 NLRB 717 (2001).

In furthering the legislative objectives of Section 8(f)—lending stability to the construction industry while fully protecting employee free choice principles—the *Deklewa* Board adopted a rebuttable presumption that a bargaining relationship in the construction industry was governed by Section 8(f). Id. at 1387–1388. It left open the possibility, however, that an 8(f) representative could establish 9(a) status either through a Section 9 certification proceeding or "from voluntary recognition accorded…by the employer of a stable work force where that recognition is based on a clear showing of majority support among the unit employees, e.g., a valid card majority." Id. at 1387 fn. 53. The burden of proving the existence of a 9(a) relationship would fall on the party making that assertion. Id. at 1385 fn. 41; see also *Allied Mechanical Services,* supra at 82.

Generally, a construction union can rebut the 8(f) presumption by "showing that it made an unequivocal demand for, and that the employer unequivocally granted, majority recognition based on a showing of majority support in the unit." *Central Illinois Construction*, 335 NLRB 717, 719–720 (2001) (hereinafter *Central Illinois)*. In that case, the Board also clarified that contract language alone can independently establish the Section 9(a) status of a labor organization:

> A recognition agreement or contract provision will be independently sufficient to establish a union's 9(a) representation status where the language unequivocally indicates that (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition

[26] Even though Gilchrist testified that he severed ties with MICA because firestopping was distinguishable from insulation work and was not eventually made a Davis-Bacon trade classification, neither party contends that firestopping fails to qualify as "construction" work within the meaning of Sec. 8(f) of the Act. Therefore, I do not address that issue.

was based on the union's having shown, or having offered to show, evidence of its majority support.

In recognizing the sufficiency of contract language to establish a 9(a) relationship, the *Central Illinois* Board explicitly adopted the standards articulated by the United States Court of Appeals for the Tenth Circuit in *NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147 (10th Cir. 2000), enfg. 327 NLRB 42 (1998), and *NLRB v. Oklahoma Installation Co.*, 219 F.3d 1160 (10th Cir. 2000), denying enf. 325 NLRB 741 (1998). In that regard, however, *Triple C Maintenance, Inc.* conflicts with the subsequent decision in *Nova Plumbing Inc.*, 336 NLRB 633, 635 (2001), enf. denied 330 F.3d 531 (D.C. Cir. 2003). In *Nova Plumbing, Inc.*, the D.C. Circuit held that unambiguous contract language alone cannot establish a 9(a) relationship "where . . . the record contains strong indications that the parties had only a section 8(f) relationship." Id. at 537. That approach, however, has not lessened the Board's reliance on the *Central Illinois* principles. See, e.g., *Madison Industries,* 349 NLRB 1306, 1309 (2007); *M&M Backhoe Service, Inc*., 345 NLRB 462 (2005).

Having prosecuted this case under the controlling principles set forth in *Central Illinois*, Counsel for the General Counsel, at the direction of the General Counsel, read a statement into the trial record urging that *Central Illinois* be overruled. The General Counsel suggests that a better approach would permit the employer to introduce extrinsic evidence showing that the union lacked majority support, even where the contractual provision clearly states otherwise. I found the General Counsel's proposal to be somewhat peculiar in light of the fact that the Union's business representative was legally unavailable (deceased) to refute Gilchrist's testimony regarding the circumstances surrounding the execution of the 2003 Agreement. The proposal would even apply in instances where, as here, the employer unreasonably delayed challenging majority status for years to the detriment of the Union.[27] In any event, I am constrained to apply the Board's principles set forth in *Central Illinois* to the facts of this case.

The pertinent facts reveal that, after approaching and negotiating with the Union in 2003, the Company invited the Union's business representative to solicit union membership among the field employees. Gilchrist's testimony, taken in context with the clear and unambiguous language of 2003 Agreement's recognition clause, established that: (1) the Union subsequently obtained union authorization cards from a majority of the employees; (2) made a "claim," that is, a request or demand, that the Company recognize the Union as their labor representative; (3) the Company verified that "claim" with a "card check" of the authorization cards; and (4) the Company expressly and unconditionally recognized the Union. As a result, the parties entered into the 2003 Agreement and several successor agreements or extensions through August 1, 2009. Prior to August 1, 2009, the Company neither contested the Union's status as employees' labor representative nor sought to terminate any of the aforementioned agreements. On that date, however, based on its assertion that it had an 8(f) relationship with the Union, the Company withdrew recognition of the Union. It is also undisputed that, since that time, the Company has refused to meet and negotiate with the Union, has made unilateral changes to the terms and conditions of its employees, and has failed to contribution to their union pension funds.

Applying the *Central Illinois* test, the recognition clause in the 2003 Agreement meets all of the elements necessary to establish a 9(a) relationship. The language unequivocally shows that the Union sought recognition as the majority representative of the Company's bargaining unit employees, the Union provided documentary proof to support its "claim," the Company

[27] See fn. 6.

acknowledged being shown that proof through a "card check" and agreed that the Union represented a majority of its employees pursuant to Section 9(a). In *M&M Backhoe Service,* supra at 462, 465, the Board found a very similar provision to be clear and unambiguous for purposes of establishing a 9(a) relationship:

> The Union claims, and the Employer acknowledges and agrees, based on a showing of signed authorization cards, that a majority of its employees have authorized the Union to represent them in collective bargaining. The Employer hereby recognizes the Union as the exclusive bargaining agent under Section 9(a) of the National Labor Relations Act of all full-time and regular part-time Equipment Operators, Oilers, Drivers and Equipment Mechanics on present and future jobs sites within the jurisdiction of the Union.

The Company contends that the recognition clause in the 2003 Agreement is ambiguous because it states that the Company recognized the Union "as if" it "had been certified pursuant to Section 9(a)." I disagree. The phrase, "as if," simply reflects the fact that there was no Section 9(a) certification proceeding and that the parties entered into a 9(a) relationship through the other avenue available – voluntary recognition accorded by the Company based on a clear showing of majority support among the unit employees evidenced by authorization cards. Indeed, the Board has previously determined that similar contract language is sufficient evidence that the parties intended to create a Section 9(a) relationship. See *Casale Industries,* 311 NLRB 951 (1993) ("as if the election had been conducted by the NLRB itself and an appropriate certification(s) issued"). See also *Deklewa*, supra at 1387 fn. 53. Cf. *Madison Industries,* supra at 1306, 1309 (agreement did not reflect a 9(a) relationship where it contained a provision waiving the respondent's right to file an election petition, which is unnecessary under Section 9(a), during the term of the agreement.)

The Company also contends that a variation in the language of the recognition clauses contained in the 2006 Agreement and the 2007 Addendum indicates the absence of a 9(a) relationship. While those recognition clauses, standing alone, would be insufficient to establish a 9(a) relationship, they do nothing to dispel the notion that the Union, in 2003, requested recognition, demonstrated majority support and obtained recognition through a card-check verification by the Company. Having satisfied the *Central Illinois* test and established a 9(a) relationship through the 2003 Agreement, the Union was not required to request and demonstrate majority support every time the parties renewed or modified the original agreement. Therefore, the absence of any reference to such a showing in subsequent recognition clauses is of no consequence to the parties' 9(a) relationship. That relationship could only be undone by the Company's subsequent demonstration that the Union lost majority status. *Levitz Furniture Co. of the Pacific, Inc.*, supra.

Relying on Gilchrist's unrefuted testimony, the Company also contends that the contractual language is insufficient to establish a 9(a) relationship because the Union had not, as of October 23, 2003, obtained the majority support of the Company's field employees. However, as previously explained, given that the 2003 Agreement was retroactive to August 1, 2003 and its recognition clause was clear and unambiguous, I did not credit Gilchrist's assertion that a majority of his employees had not joined the Union as of October 23, 2003. Moreover, Gilchrist's assertion as to whatever his understanding was with Shull, who is now deceased, was irrelevant since the recognition clause was clear and unambiguous. Collective bargaining agreements that are unambiguous are not amenable to further interpretation or amplification based on parole evidence. *Contek International*, 344 NLRB 879, 884 (2005); *Quality Building Contractors, Inc.*, 342 NLRB 429, 430 (2004); *America Piles*, 333 NLRB 1118, 1119 (2001); *NDK Corp.*, 278 NLRB 1035 (1986); *F&C Transfer Co.*, 277 NLRB 591, 596 (1985).

II. The 10(b) Statute of Limitations

The Company's nearly 6-year delay in contesting the Union's majority status presents it with an additional dilemma – the time bar provision of Section 10(b) of the Act. The Congressional premise behind Section 10(b) sought to strengthen the "stability of bargaining relationships." *Bryan Mfg. Co. v. NLRB,* 362 U.S. 411,425 (1960). It also reflected a balancing of "the interest of employees in redressing grievances and vindicating their statutory rights" and the "interest in industrial peace which is the overall purpose of the Act to secure." Id. at 428.

Prior to 1993, the Board limited application of Section 10(b) to the nonconstruction industry. Nevertheless, a construction industry employer that was party to a multiemployer association agreement with a union that asserted 9(a) status could only challenge majority status within a reasonable time after the employer extended recognition. *Comtel Systems Technology, Inc.*, 305 NLRB 287, 290 (1991) (allowing an employer's petition to verify the union's majority status within 4 months after employer signed multiemployer association agreement). In *Casale Industries*, supra at 952–953 (1993), the Board provided further guidance by deciding that Section 10(b)'s time limitations should also be applied to the construction industry. Noting that parties in the construction industry are entitled to no less protection than parties in nonconstruction industries, it held that "if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition." Id. at 953. The Board, applying Section 10(b)'s time limitation as a parameter of reasonableness, found that the employer's 6-year delay in challenging the Union's majority status—the same amount of time here—was time-barred.

Therefore, even if the Company had voluntarily recognized the Union on October 23, 2003 based solely on the latter's assertion of majority status, without verification, the Company was precluded from contesting that status beyond the 6 months after initial recognition, or April 23, 2004. *Casale*, supra at 952–953; *Oklahoma Installation Co.*, 325 NLRB 741, 742, citing *Hayman Electric*, 314 NLRB 879, 887 fn. 8 (1994).

Once again, the General Counsel proposes to overrule case law that would otherwise support its case. In this instance, he proposes that instead "of treating voluntary recognition in the construction industry under the same set of 10(b) rules that apply to employers outside of [the construction] industry," a better rule would "allow claims of full 9(a) status to be appropriately challenged by employers and employees beyond the 10(b) period."[28] That approach, however, disregards the unreasonableness of the delay involved: the length of the delay—6 years—and the prejudice to the Union by Shull's death during the delay period. In any event, given a judge's mandate to apply extant Board decisional law, *Casale* controls and the Company's challenge to the Union's majority status is time-barred.

Based on the foregoing, the Company's withdrawal of recognition of the Union on August 1, 2009, its refusal to bargain with the Union regarding the terms of a collective-bargaining agreement to succeed its contract with the Union, which expired on August 1, 2009, and its changes to employees' pay, wages, and terms and conditions of employment without first notifying and bargaining in good faith with the Union to either agreement or impasse, the Company violated Section 8(a)(5) and (1) of the Act.

[28] GC Brief at 15–19.

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By withdrawing recognition from the Union as the exclusive collective-bargaining representative of employees in the bargaining unit, refusing to bargain with the Union regarding the terms of a collective-bargaining agreement to succeed its contract with the Union, which expired on August 1, 2009, and making changes to employees' pay, wages, and terms and conditions of employment without first notifying and bargaining in good faith with the Union to either agreement or impasse, the Company violated Section 8(a)(5) and (1) of the Act.

4. By engaging in the conduct described above, the Company has committed unfair labor practices affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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Remedy

Having found that the Company has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Company shall be ordered to, on request, bargain with the Union, rescind any changes to employees' terms and conditions of employment made on or after August 1, 2009, retroactively restore terms and conditions of employment, including wage rates and benefit plans to what they were prior to August 1, 2009. The Company shall be further ordered to make whole bargaining unit employees to the extent they have suffered any losses to the Union's health and welfare, pension and other benefit funds occurring on or after August 1, 2009, as the result of the Company's unilateral changes. Finally, the Company shall be ordered to recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of employees concerning wages, hours and other terms and conditions of employment, and put in writing and sign any collective-bargaining agreement reached.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The Company, American Firestop Solutions, Inc., Respondent, Waukee, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize the Union as the exclusive collective-bargaining representative of employees in the bargaining unit.

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Refusing to bargain with the Union regarding the terms of a collective-bargaining agreement to succeed its contract with the Union which expired on August 1, 2009.

(c) Making changes to employees' pay, wages, and terms and conditions of employment without first notifying and bargaining in good faith with the Union to either agreement or impasse.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union, rescind any changes to employees' terms and conditions of employment made on or after August 1, 2009, retroactively restore terms and conditions of employment, including wage rates and benefit plans to what they were prior to August 1, 2009.

(b) Make whole bargaining unit employees to the extent they have suffered any losses to the Union's health and welfare, pension and other benefit funds occurring on or after August 1, 2009 as the result of the Company's unilateral changes.

(c) Recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of employees concerning wages, hours and other terms and conditions of employment, and put in writing and sign any collective-bargaining agreement reached.

(d) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full time and regular part-time mechanics, apprentices, pre-apprentices and applicators who perform insulation and/or fire-stop work and are employed by the Company at its Waukee, Iowa location; excluding professional employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Waukee, Iowa, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2009.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 1, 2010

_____
Michael A. Rosas
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT withdraw recognition from the International Association of Heat & Frost Insulators and Allied Workers Local No.74 (Union) as the exclusive collective-bargaining representative of our employees in the unit described below.

WE WILL NOT refuse to bargain with the Union regarding terms of a collective-bargaining agreement to succeed our contract with the Union, which expired on August 1, 2009.

WE WILL NOT make any changes to employees' pay, wages, and terms and conditions of employment without first notifying and bargaining in good faith with the Union to either agreement or impasse.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union and rescind any changes to your terms and conditions of employment made on or after August 1, 2009.

WE WILL, on request of the Union, retroactively restore terms and conditions of employment, including wage rates and benefit plans to what they were prior to August 1, 2009.

WE WILL make whole bargaining unit employees to the extent they have suffered any losses as the result of our unilateral changes on and after August 1, 2009.

WE WILL make whole the Union health and welfare, pension and other benefit funds for any losses due to our unilateral changes occurring on or after August 1, 2009.

WE WILL recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of employees concerning wages, hours and other terms and conditions of employment, and put in writing and sign any agreement reached, in the following unit:

All full time and regular part-time mechanics, apprentices, pre-apprentices and applicators who perform insulation and/or fire-stop work and are employed by us at our Waukee, Iowa location; excluding professional employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

All full time and regular part-time mechanics, apprentices, pre-apprentices and applicators who perform insulation and/or fire-stop work and are employed by us at our Waukee, Iowa location; excluding professional employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

330 South Second Avenue, Towle Building, Suite 790
Minneapolis, Minnesota 55401-2221
Hours: 8 a.m. to 4:30 p.m.
612-348-1757.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 612-348-1770.